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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 621

UNITED STATES OF AMERICA, PETITIONER

v.

KANSAS CITY LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered on December 1, 1947.

OPINION BELOW

The opinions of the Court of Claims (R. 35–40) is reported in 74 F. Supp. 653.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 41). On February 2, 1948, the plaintiff's motion for a new trial was allowed and the conclusions of law were amended to include provision for interest (R. 41).

The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the United States to pay compensation to an owner of land upon a non-navigable tributary of a navigable river where, for the purpose of improving navigation, the Government stabilizes the level of the river at the ordinary high-water mark and does not raise the level beyond that mark.

2. Whether there is a "taking" within the meaning of the Fifth Amendment when the Government's activities interfere with drainage of property without backing water onto the land.

3. Whether a finding that the Government has exercised the privilege, for which respondent is given compensation, of maintaining and operating a lock and dam some 25 miles downstream from respondent's land is sufficient to satisfy the requirement that the findings contain an accurate description of the property which the court concludes was taken from respondent.

STATEMENT

The judgment sought to be reviewed awards respondent the sum of $22,519.60 with interest from August 8, 1938, as a part of just compensation. To support its judgment the court below made findings which may be summarized as follows:

The United States erected Lock and Dam No. 26 on the Mississippi River near St. Charles, Missouri, for the purpose of providing a nine-foot navigable channel in the river, construction being completed in 1938 (Fdg. 4, R. 22). The respondent owns land known as the Baldwin Farm situated on Dardenne Creek, a nonnavigable stream which empties into the Mississippi about one and one-half miles below respondent's property and 25 miles above Dam No. 26 (Fdg. 2, R. 21–22). Prior to construction of the dam the ordinary high-water mark of the river at the mouth of Dardenne Creek was 420.4 feet (Fdg. 11, R. 27).[1] The average pool elevation maintained there from August 1938 to May 1941, after the dam was put in operation, was 420.4 feet (Fdg. 12, R. 27).[2] Respondent's farm varies in elevation from 422.7 feet to 428 feet and is protected by levees whose lowest elevation is 432.7 feet (Fdg. 11, R. 7). Hence, as the court found (Fdg. 13, R. 28), "the operation of defendant's dam and pool does not cause any flooding of plaintiff's land".

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[1] For convenience, elevation will be referred to at the mouth of Dardenne Creek, although the gauge was located at Dixon's Landing about a mile away, since the court found that the elevations at those points are "about the same" (Fdg. 11, R. 27).

[2] The maximum authorized pool elevation at Dam 26, 25 miles downstream, is 419 feet. When the water is held at that elevation, the elevation at the mouth of Dardenne Creek varies from 419.1 to 422.5 feet, depending upon the volume of flow in the river (Fdg. 12, R. 27).

The injury for which compensation was awarded resulted from interference with surface and sub-surface drainage. Many years prior to the erection of Dam No. 26, a system of ditches and culvert pipes for lateral surface drainage had been constructed with a main carrying water to a borrow pit from which some 14 or 15 outlet pipes drained water into Dardenne Creek. (Fdg. 15, R. 29.) In 1943, two 48-inch pipes were laid for a similar purpose. These outlet drains are at an elevation of about 420 feet (Fdg. 17, R. 30). The bed of the creek is at elevation 410 to 413 feet and, prior to the erection of Dam No. 26, the water in the creek was two or three feet deep except during floods on the Mississippi or after heavy rainfall on the watershed of the creek (Fdg. 17, R. 30). As a result of operation of Dam No. 26, elevation of the water in the creek has been raised six or seven feet above the previous normal level "so that the creek water now backs into some of the outlet pipes in the plaintiff's levee,[3] thereby obstructing and delaying the drainage of surface water from plaintiff's land" (Fdg. 18, R. 31). The court also found (Fdg. 19, R. 31):

> The record does not disclose the extent to which the operation of Dam 26 obstructs or delays the drainage of surface water

[3] All of these pipes have swinging doors which close when the water in the creek rises to the level of the gates (Fdg. 15, R. 29).

> from the Baldwin Farm and there is no satisfactory proof with respect to the character or the cost of additional drainage and pumping facilities which will be required to offset the condition created by the operation of the dam. However, under controlled river conditions, the water is held on the land after a rain for longer periods than was formerly the case and it will be necessary to provide additional drainage and pumping facilities in order to farm the land.

Some surface water drains vertically into the sub-soil. Sub-surface drainage depends upon the fact that there is a stratum of water-bearing sand under the land, the top elevation of which, varies from 412 to 414 feet. The water in the sand is affected by the rise and fall of the Mississippi River and by rainfall on the land (Fdg. 16, (R. 30). However, the water table in the plaintiff's land is now, and always has been, higher than the river stage (Fdgs. 16, 20 R. 30, 32). Spring floods of the Mississippi and Dardenne Creek occur with about the same frequency after erection of Dam No. 26, as they did before. However, prior to erection of the dam, the river stage after the floods dropped to about 410 to 412 feet elevation where it remained for several months at the end and beginning of the year, thus furnishing drainage of the water from the land (Fdg. 19, R. 31-32). Now, the river is not allowed to drop to those extreme low levels, but is held at the

natural ordinary high-water mark. The result has been that drainage of underground water beneath a large area of the land has been almost entirely shut off, the opportunities formerly available for draining surface and sub-surface water are no longer available, and the water table is four to five feet higher than it formerly was during low stages of the Mississippi River (Fdg. 18, 19, 20, R. 31–32).

This change of conditions required the planting of different crops which mature in a shorter time and the yield and quality of corn and wheat decreased (Fdgs. 20, 21, R. 32). Before erection of the dam, a certain portion of the land was valuable only as a duck hunting preserve and its value has not been diminished by operation of the dam (Fdg. 24, R. 34). As to another tract the findings state (Fdg. 24, R. 34):

> Prior to August 8, 1938, the date on which full-pool stage above Dam 26 was first obtained, this 302.96 acres had a limited use for agricultural production, but there is no satisfactory proof of the exact amount by which the operation of the dam has impaired its market value. A reasonable estimate of the amount by which its value was reduced by August 8, 1938, as a result of the operation of Dam 26, is the sum of $1,694.60.

A third tract was diminished in market value by more than one-half of its former value and such

impairment amounted to $13,475.00 (Fdg. 26, R. 34–35). The value of a fourth tract was reduced $7,350,000 (Fdg. 27, R. 35). Finally, the court found (Fdg. 29, R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

On the basis of these findings, judgment was entered on December 1, 1947, for $22,519.60. The conclusions of law were amended on February 2, 1940, to include an allowance of interest (R. 41).

The Court of Claims held that, by preventing surface or underground drainage and so converting land into a "pond or marsh," the Government took the land. For this holding, it cited no authority. It held further that since this land was located on a non-navigable tributary of a navigable stream (rather than on the navigable stream itself) the Government was bound to pay damages even though it had not raised the level of the navigable stream above its ordinary highwater mark. For this further holding, it relied on *United States* v. *Cress*, 243 U. S. 316. Judge Whitaker dissented.

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Willow River Co.*, 324 U. S. 499, this Court reaffirmed the settled rule that the United States is not required to compensate persons who are injured because the level of a navigable river is raised to ordinary high water mark, saying (p. 509): "Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation." In *United States* v. *Chicago, M., St. P. and P. R. Co.*, 312 U. S. 592, the basis of the doctrine was stated as follows (pp. 596–597):

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

It has never been suggested heretofore that this dominant power is limited by a requirement that compensation be paid to the extent that improvements in the bed of the river affect lands above high-water mark or upon non-navigable tribu-

taries. The majority of the court below concluded, however, that the decision in *United States* v. *Cress*, 243 U. S. 316, compelled such a result. We submit that the court below seriously misconceived the scope of the *Cress* decision, and that review by this court is therefore required.

In the *Cress* case it did not appear that the water level in that case was raised simply to high water mark. That the *Cress* case is not authority for the proposition that persons owning property on non-navigable streams have greater rights than do riparian owners on navigable streams is apparent from the statement in that opinion (p. 319): "In passing upon this contention [that the United States might perform the acts complained of in order to improve navigation without liability] we may assume, without however deciding, that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks." The majority of the court below did not suggest any logical reason for its distinction, and none can be given. The decisions in the *Willow River* and the *Chicago, M., St. P. & P. R. Co.* cases were based on the principle that riparian owners upon navigable streams do not have a right to have the water of the stream flow from their lands as in a state of nature, because the federal government has dominant servitude or power over the bed of the stream. Cf. *United States* v. *Commodore Park*, 324 U. S. 386,

391. No reason exists why owners of land abutting upon non-navigable tributaries of navigable rivers should be given greater rights. In both cases the same Governmental power to improve navigable waters is exercised. Hence, it is submitted that either (a) the court below misconstrued the *Cress* decision, or (b) if the *Cress* case is ambiguous on this score, it should be clarified so as to make it clear that the United States has dominant power to improve navigable streams not only as against riparian owners, but also as against owners of non-riparian property, when the water level has not been raised above the high water mark.

2. In any event, the damage to respondent's lands inflicted here does not constitute a taking within the meaning of the Fifth Amendment. The court below found that operation of the dam "does not cause any flooding of plaintiff's land" (Fdg. 13, R. 28). The injury results simply from interference with drainage, principally sub-surface. A "taking" occurs where there is a permanent flooding of fast lands outside the bed of the river or permanent liability to intermittent but inevitably recurring overflow. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Cress*, 243 U. S. 316. These decisions represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *United States* v. *Sponenbarger*, 308 U. S. 256, 265. Thus,

in *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.) it was held that impairment of drainage was not a taking. This conclusion was approved by this Court in *United States* v. *Lynah*, 188 U. S. 445, 474. Again, in *Christman* v. *United States*, 74 F. 2d 112 (C. C. A. 7), the court held that the injury resulting from overflow of a non-navigable creek which was unable to discharge the water from spring freshets as quickly as it had before the Government built a dam which raised the pool level of the Ohio River was consequential and not recoverable. And, in *United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7) certiorari denied, 311 U. S. 706, the court held: "Whatever defendants' remedy may be in other forms of action, an interference with the subsurface drainage is not within taking under the eminent domain power." The same result was reached in *Lynn* v. *United States*, 110 F. 2d 586 (C. C. A. 5).

Ignoring all of these decisions, the opinion below simply stated (R. 38) that the court saw no real difference between flooding land with water and converting it into a pond or marsh by preventing drainage. But, as the findings of the court recognized, there was no permanent and complete destruction of respondent's lands but merely some partial injury to them, limiting their use for growing certain crops. The decision below represents, we submit, a failure to recognize the well-settled distinction between "taking" of property and damaging of it, and is in conflict

with the cases cited above which hold that interference with drainage constitutes damage and not a taking.

3. The opinion of the court below discussed the question "whether there has been a taking of the plaintiff's land within the meaning of the Constitution," reasoned that one of the valuable incidents of plaintiff's ownership was that surface and underground water passed off his land, and concluded that the Government was not privileged "to 'take' without compensation the interest which we have discussed above in the plaintiff's land" (R. 39). The entire use of respondent's land was not destroyed and hence there was no taking of fee title. Apparently, it was the court's theory that the United States had taken some sort of a right to have the land drained by the natural changes in the levels of the Mississippi River. The findings, however, do not describe any such right. But as this Court held in *United States* v. *Causby,* 328 U. S. 256, 267, "an accurate description of the property taken is essential, since that interest vests in the United States" and the deficiency of findings in this regard may not be rectified by statements in the opinion. In the instant case, there is no finding that the United States had taken an easement or any analogous interest in respondent's land. The only finding purporting to describe what the Government is required to pay for states as follows (R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

This constitutes simply a statement that the Government had the "privilege" of carrying on a governmental activity twenty-five miles downstream from respondent's land. But the right of the United States to engage in the governmental activity of improving navigation arises from its constitutional powers, not as the result of any seizure from the respondent. The quoted finding, therefore, fails to satisfy the requirement that there be "an accurate description of the property taken." An essential finding to support the judgment is, therefore, lacking.

4. The questions presented are of great general importance. In almost all instances when navigable rivers are improved, nonnavigable tributaries are in some degree affected since water insists on finding its own level. An authoritative determination of the question is desirable not only as a precedent to be followed by the courts in determining similar claims but, perhaps more important, as a guide to administrative officers and

Congress in estimating the probable cost of river improvement projects and in planning operation of them in the most economical manner. Since almost every river improvement will affect, in some degree, drainage from lands in the watershed—indeed that is one of the primary objectives of both navigation and flood control projects—adoption of the view taken by the court below will to a great extent render the Government's navigation servitude illusory.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1948.